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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 193

SAMUEL FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof

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Dated, New York, July 22, 1943.

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Supreme Court of the United States

OCTOBER TERM, 1943

SAMUEL H. FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Samuel H. Feldman, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit (No. 180, October Term, 1942) entered on June 24, 1943.

History of Case

This case arose in the United States District Court, Southern District of New York, where petitioner was indicted on August 10, 1940, charged with the offense of having used the mails in aid of a scheme to defraud (pp. 2-14). The case was tried before Honorable Bascom S. Deaver, District Judge of the Middle District of Georgia, sitting temporarily in New York, and a jury, from June 12, 1942, to July 8, 1942. Petitioner was found guilty and was sentenced, on July 9, 1942, to a term of imprisonment of five years and five years probation thereafter (pp. 20-21; 1510-1). The sentence of imprisonment of five years

was the maximum sentence on any one substantive count in the indictment. Application for bail was denied (p. 1511), and your petitioner was thereupon and has since been imprisoned under the said sentence.

On appeal to the United States Circuit Court for the Second Circuit, the judgment of conviction was affirmed by a divided court. The appeal was argued on February 9, 1943, and was decided eighteen weeks later—on June 8, 1943. The order of affirmance was entered June 24, 1943 (p. 1678). The majority opinion in the Circuit Court of Appeals was written by Circuit Judge Thomas W. Swan (pp. 1665-1675), and the dissenting opinion by Circuit Judge Charles E. Clark (pp. 1675-1677). Neither opinion has as yet been officially reported.

Summary Statement of the Matter Involved

The indictment charged the defendant with a scheme to defraud by means of "kiting" checks. In essence, it was alleged that petitioner in New York City and elsewhere cashed checks drawn on an account in a bank in Michigan in which there were insufficient funds and that he, thereafter, cashed additional checks and wired to the bank the cash proceeds of the latter items in order to cover the earlier checks, petitioner relying on the usual passage of four days from the date of cashing to that of clearance of each check. It was alleged that petitioner continued this practice from August, 1936 to the date of the filing of the indictment in August, 1940. On the trial the Government claimed only three alleged victims, namely, Essex House, Edward S. Reynolds and Stout & Co. (pp. 1500, 1). It was and is petitioner's position that there was no scheme to defraud since the three alleged victims were fully conversant with and aware of the fact

and had not been misled or deceived by petitioner at all. As stated by Judge Clark, at the very opening of his opinion:

> "• • • There was real doubt whether he had defrauded his friends or merely imposed upon their good nature and willingness to help him as he wished." (p. 1675).

Questions Involved

Several important questions of law are clearly presented by the record in this case:

(1) Whether petitioner's constitutional right against self-incrimination, as guaranteed by the Fifth Amendment of the Constitution of the United States, was violated by the admission in evidence, as part of the prosecution's direct case, over petitioner's timely objection, of his testimony in supplementary proceedings before various courts of the State of New York, which testimony was compulsory and obtained pursuant to an immunity statute of the State of New York (New York Civil Practice Act, Section 789—formerly Section 791)?

Petitioner did not take the stand to testify in his own behalf. Nevertheless, and as part of its direct case, the Government introduced testimony of petitioner's examinations in supplementary proceedings (pp. 1131-1149; 1588-1607; 1613-1628; Government Exhibits 95, 95-A, 95-B, 100, 101 and 102-A through E). The prosecutor used this compulsory testimony upon the trial to prove, through petitioner's own involuntary admissions, two vital parts of the prosecution's case: (a) petitioner's inability to meet the "kited" checks referred to in the indictment; and (b) that petitioner was "kiting" checks in the manner and under the scheme charged in the indictment.

That this evidence, consisting of the self-incriminating testimony of petitioner, was most vital to the Government's affirmative case and extremely prejudicial to petitioner is conceded by the majority in its opinion, for Judge Swan wrote, in connection with the point raised by petitioner that the admission of such evidence was a violation of his constitutional privilege under the Fifth Amendment, as follows:

> "If the objection was well taken, the judgment must be reversed * * *." (p. 1669)

The introduction of this testimony into evidence occurred towards the end of the prosecution's case. It took up approximately one and a half days of court time. Moreover, the matters therein contained were strongly commented upon by the prosecutor in his summation, notwithstanding continued objection by petitioner (pp. 1234; 1463-1466).

(2) Whether petitioner was not deprived of a fair trial in view of the numerous errors committed and permitted by the trial court, despite petitioner's timely objection and exception, some of which errors are pointed out in both the majority and minority opinions of the Circuit Court?

(a) *Re cross-examination of witnesses*

After the prosecution had attempted to prove through direct examination of the witnesses Miller and Goetz, the two partners of Stout & Co., that they had been defrauded by petitioner (pp. 761-776; 840-855; 907-912), the latter was not permitted to cross-examine these witnesses as to their prior statements and acts relating to the very crime with which petitioner was charged, which statements and

acts were inconsistent with and contradictory to their direct testimony, and thus to discredit their testimony (pp. 973-978; 1012-1026). The minority opinion asserts that this error alone, this deprivation of petitioner's basic right of cross-examination, warranted reversal (p. 1676). The majority opinion (pp. 1674-5) admits that the District Court's rulings were erroneous but claims that they could not have affected the jury's verdict despite the fact that (1) of all three transactions in question, by far the largest loss was suffered in the Stout & Co. transaction; (2) the testimony given by these witnesses consumed one and a half court days and 682 folios of testimony; (3) the dealings with Stout & Co. were a substantial part of the alleged scheme of petitioner to defraud; (4) this transaction was stressed in the summation of the prosecutor and was the only one of the three in question which was specifically named and discussed by the trial judge in his charge to the jury (pp. 1483-1485).

(b) *Re Emanuel & Co. transaction*

The Government offered, on its direct case, evidence of an alleged illegal act on the part of petitioner which occurred during the early part of the year 1930 (pp. 995-7), some six or seven years before the crime to defraud charged in the indictment, and entirely unrelated to the crime alleged.

During 1930, petitioner had a margin stock trading account with Emanuel & Co., stockbrokers in New York City. In connection with a call for margin, petitioner deposited in his said margin account a $50,000 draft which was subsequently dishonored. At the time petitioner had a substantial equity in the account; moreover, previous drafts of smaller amounts had been honored (p. 989).

During the time that petitioner was in default there was a severe reaction in the market and largely as a result of this a loss to Emanuel & Co. amounting to $57,000 occurred (pp. 1047-1050). No claim was made by the prosecution that this was one of a series of continuous acts involving check "kiting".

Both the majority and minority opinions of the Circuit Court express serious doubts as to the admissibility of this evidence. The majority, however, decided that its admission was not prejudicial despite the fact that it was referred to constantly in the United States attorney's summation and was characterized by him as showing "the common scheme and plan this man has used since 1930" (p. 1468); despite the fact that this proof was in its very nature highly prejudicial and clearly inadmissible (pp. 985-7) and was presented near the very end of the Government's case; despite the fact that this testimony comprised some 135 pages of the record, took one and a half trial days to present, and in essence attempted to show that the defendant in 1930 caused a loss of $57,000 to the stock brokerage firm of Emanuel & Co. (pp. 985-1011; 1033-1130).

(c) *Re bill of particulars*

The Government attempted to prove that petitioner had defrauded only three individuals, namely, Essex House, Edward S. Reynolds and Stout & Co. Nevertheless, and over objection, the court sent to the jury, at the very inception of its deliberations, the Government's bill of particulars, embodying the names of 115 alleged victims (p. 1488). The prosecutor had conceded (pp. 1560-1) that only three of the persons named in the indictment and the bill of particulars had been the subject of testimony adduced at the trial. Consequently the prosecutor offered to limit

the bill of particulars to those three out of the 115 persons named in the bill (pp. 1500-1). The trial court, however, refused thus to limit the bill and sent it to the jury in its entirety (p. 1501). The trial court charged the jury in such a manner that it might return a verdict based upon the defrauding of any one of the 115 named persons (p. 1506). By this action alone, the court erroneously created an impression in the jury's mind of wholesale wrongdoing and the defrauding of a multitude of persons on the part of petitioner.

(d) *Re charge to the jury.*

The trial court, throughout its charge, instructed the jury that it could bring in a verdict of conviction against petitioner if he had devised a scheme to obtain money under false pretenses (pp. 1473, 1477-9, 1483, 1484, 1487-8). Petitioner was not indicted for such a crime (pp. 2-14). At the completion of the charge, and in chambers, counsel for petitioner called the attention of the court to this error. The trial judge then admitted that he had not read the indictment before or during the trial and that he had charged the jury incorrectly as to the essential nature of the crime set forth in the indictment (pp. 1506-7). When the trial judge finally read the indictment and attempted to correct his charge in the light thereof, petitioner requested (this) specific charge to the jury:

> "• • • I ask your Honor to charge the jury that they cannot find this defendant guilty of a scheme to obtain money under false pretenses, that that crime is not charged in the indictment." (p. 1507)

The court refused to give petitioner the benefit of the requested charge (pp. 1507-8) despite the necessity therefor

which was created by the judge's own admitted error (pp. 1506-7).

(e) *Re other and numerous errors*

Numerous other errors were committed by the trial court, all of a serious and prejudicial character. Among them, but not limited to the same, were the inequitable and different treatment of counsel, referred to in Judge Clark's dissenting opinion (p. 1677), the incorrect charge of the trial judge on several other vital elements of the case (pp. 1493-5), and the prejudicial remarks and questions by the prosecutor permitted by the court, reference herein being particularly made to the improper comment by the prosecutor upon petitioner's failure to call a witness (p. 1469). The existence of such further error is called to the attention of the court, but details thereof are not herein set forth because of the limitation of space.

Reasons for Granting the Writ

The questions presented are of great public importance. They involve a determination of fundamental civil liberties which have not been but should be settled by this court.

The violation of the Fifth Amendment of the Constitution of the United States by reason of the compulsory self-incrimination of petitioner was caused in this case by the admission in evidence of the compulsory testimony given by petitioner in examinations in the courts of the State of New York. However, the fundamental problem herein far transcends the use of compulsory testimony obtained in supplementary proceedings. It extends to all testimony compulsorily adduced in one jurisdiction, whether in supplementary proceedings, in grand jury proceedings or in any one of the myriad immunity statutes, which testimony is then subsequently offered into evidence

in a criminal proceeding in another jurisdiction to establish the guilt of the very defendant who had theretofore been compelled to give such testimony. The question as presented, therefore, goes to the very essence of one's right against self-incrimination as guaranteed by the Fifth Amendment of the Constitution of the United States since this testimony was offered and received in evidence as part of the Government's direct case and to prove the essential elements constituting the crime.

This court has already decided, and it is established law, that a party may not refuse to answer a question in one jurisdiction because his answer may incriminate him in another and different jurisdiction. (*Jack* v. *Kansas,* 199 U. S. 372 (1905); *Brown* v. *Walker,* 161 U. S. 591 (1895); *U. S.* v. *Murdock,* 284 U. S. 141.) On the other hand, this court has never passed upon the question as to the admissibility in the second jurisdiction of the testimony which it has stated could be compelled to be given in the first jurisdiction. This court has stated that it was unwilling to believe that a prosecutor would offer testimony which had been thus obtained under compulsion. (*Jack* v. *Kansas, supra.*) In the case at bar, not only did the prosecutor offer such testimony but he actually relied upon it as his most important, effective and prejudicial testimony.

As appears from the opinions of the Circuit Court below, despite intensive research on the part of counsel for petitioner and counsel for the Government and despite intensive research by the Circuit Court, which deliberated for some eighteen weeks, there is no Federal decision directly on the question. Judge Swan wrote as follows:

> "It seems surprising that neither the researches of counsel nor those of this court have uncovered any precise authority." (p. 1671)

Judge Clark, dissenting, wrote in this vein:

> "The question of use in the Federal courts of defendant's examination in the State supplementary proceeding, absolutely privileged on a State prosecution, is, as the opinion shows, not settled." (p. 1676)

The only decision of a court of high authority to be found is *Clark* v. *State*, 68 Fla. 433. This decision sustains petitioner's contention that his right against self-incrimination had been violated and this decision, had it been followed by the majority, would have resulted in a reversal of the conviction.

The merit of petitioner's contention and of the *Clark* case cited above as well as the great danger involved in the acceptance of the rule of the majority, have been most aptly stated by Judge Clark in his dissenting opinion as follows:

> "I believe, however, that *Clark* v. *State, supra*, states the better rule, unless we definitely wish to trap persons between the interstices of the overlapping state and federal sovereignties. Cases such as *United States* v. *Murdock, supra*, show merely that defendant could not have refused to answer in the state proceedings; they do not hold that the immunity promised him can be substantially nullified by the wide scope of the federal mail fraud and conspiracy statutes. In plain fact he was required to incriminate himself. And the justification thought to be obtained by delaying prosecution until the statute of limitations had run as to matter covered by a part of his examination seems to me beneath the dignity of a great government, indeed, not the maintaining of those 'civilized standards of procedure and evidence' required by *McNabb* v. *United States*, 63 S. Ct. 608, 613." (pp. 1676-7)

This question is of such importance and so fundamental that the governing rule should not be established by a divided vote of the judges of one circuit but should, quite to the contrary, be decided by this court and become a rule of universal application throughout the country.

A further fundamental question involved is the right of a defendant to a fair trial. The decision of the majority of the court below in effect is that, no matter how many or how serious the errors of the trial judge may be, it will disregard these errors and the trial procedure adopted by the District Court and send the defendant to jail if they believe him to be guilty of the charge. The danger attendant upon such a viewpoint is evident on the statement thereof. It is all the more striking in the instant case in view of the fact that one of the three judges of the Circuit Court had very serious doubts as to the defendant's guilt under the charge set forth in the indictment. Dissenting Judge Clark wrote in this respect as follows:

> "I feel I must say that, in my judgment, not only was guilt not overwhelming, but it was so doubtful that extreme care was needed to insure a fair trial, particularly in view of the natural prejudice which defendant's conduct tended to inspire. But that care was not exercised." (p. 1675)

A clear declaration by this court as to a defendant's right to a fair trial and the limitation of the authority of Circuit Court judges to disregard error would necessarily have a salutary effect upon trial procedure in criminal cases in all the district courts of the country.

In light of the above, petitioner submits:

(1) The Circuit Court of Appeals for the Second Circuit has, in this case, decided an important question

of Federal and Constitutional law, limiting the scope and applicability of the Fifth Amendment of the Constitution of the United States, which has not been, but should be, settled by this court.

(2) Said Circuit Court of Appeals has decided other vital questions in a manner which is in conflict with applicable decisions of this court, all of which more fully appear from the foregoing statement of the questions herein involved.

(3) The said Circuit Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court as to constitute approval by it of the conduct of the trial court in depriving petitioner of a fair trial, thus calling for the exercise of this court's power of supervision.

WHEREFORE, your petitioner respectfully prays that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit be granted.

SAMUEL H. FELDMAN,
By JAMES MARSHALL,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1943

SAMUEL H. FELDMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION

Jurisdiction

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended. The judgment of conviction of the Circuit Court was entered on June 24, 1943.

Statement of the Case

The statement of the case is contained in the petition.

Specification of Errors

(1) Petitioner's constitutional right against self-incrimination, as guaranteed by the Fifth Amendment of the Constitution of the United States, was violated by the admission in evidence, as part of the prosecution's direct case, of petitioner's compulsory testimony in supplementary proceedings before various courts of the State

of New York, and the Circuit Court of Appeals erred in sustaining this violation.

(2) The Circuit Court erred in sustaining the District Court's deprivation of petitioner's basic right of cross-examination of the witnesses Miller and Goetz, the two partners of Stout & Co., on vital parts of the Government's case.

(3) The Circuit Court erred in holding that the transactions in 1930 with Emanuel & Co. were admissible in evidence.

(4) The submission to the jury of the Government's bill of particulars with the names of 115 alleged victims constituted reversible error.

(5) The erroneous charge of the trial court to the jury that petitioner was charged with and could be convicted of a crime not set forth in the indictment, and its refusal to grant petitioner's request for a specific charge correcting the same, constituted reversible error.

(6) The errors of the trial court and the conduct of the prosecutor deprived petitioner of a fair trial, and the Circuit Court of Appeals erred in failing to reverse petitioner's conviction.

ARGUMENT

I

Petitioner's constitutional right against self-incrimination, as guaranteed by the Fifth Amendment of the Constitution of the United States, was violated by the admission in evidence as part of the prosecution's direct case, of petitioner's compulsory testimony in supplementary proceedings before various courts of the State of New York, and the Circuit Court of Appeals erred in sustaining this violation.

The Government introduced at the trial testimony compulsorily given by the petitioner on six occasions in the courts of the State of New York in supplementary proceedings under an immunity statute. This compulsory testimony, composed of the petitioner's own involuntary admissions, was used to establish what was perhaps the most vital portions of the prosecutor's case, to wit, (a) petitioner's inability to meet the "kited" checks referred to in the indictment; and (b) actual "kiting" of checks by the petitioner in the manner and under the scheme charged in the indictment.

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." In accordance with that constitutional right, the defendant in the case at bar chose to remain mute and elected not to testify at his trial. Nevertheless, through the admission of the supplementary proceedings examinations, he was, in effect, compelled to be a witness against himself in violation of the Fifth Amendment.

The constitutional protection against self-incrimination is a sacred right guaranteed by the Bill of Rights. It has been held that it should be "liberally construed" in favor of a defendant.

Boyd v. *U. S.*, 116 U. S. 616, 635 (1885);
Safarik v. *U. S.*, 62 F. (2d) 892, 897 (C.C.A. 8th, 1933).

In the State of New York a judgment-debtor can be compelled to appear in court and give testimony concerning his affairs under oath. He may not refuse to testify under penalty of a contempt order resulting in fine and/or imprisonment (New York Civil Practice Act, Section 789).

However, such testimony cannot be used against him in any criminal proceeding in the State (*People* v. *Carlson*, 222 App. Div. 54, 225 N. Y. Supp. 149 (4th Dept., 1927)). The prohibition against its use in any way is so strong that its admission is reversible error even though no exception was taken.

People v. *Doyle*, 58 Hun 535 (N. Y. 1890).

It is not claimed here, nor was it claimed in the Circuit Court below, that the New York State statute immunized the petitioner against prosecution in the Federal court. However, by reason of that state statute petitioner was compelled to testify in the New York court no matter how incriminating such testimony might be. His right to refuse to answer in that proceeding on the ground of self-incrimination under the Fifth Amendment could not be raised.

Jack v. *Kansas*, 199 U. S. 372 (1905).

In *Jack* v. *Kansas*, *supra*, a state anti-trust statute compelled testimony to be given in the state court and

provided an immunity similar to Section 789 of the New York Civil Practice Act referred to above. The appellant had refused to testify nevertheless and had raised his constitutional privilege, claiming that the state immunity statute did not protect him against prosecution under the Federal Anti-Trust Act. The Kansas court held him in contempt and sentenced him to imprisonment. This court affirmed the judgment of the state court, on the ground that the danger of a Federal prosecution was remote and that it did not believe that the evidence would be availed of by the Government for the purpose of prosecution.

A similar rule has been laid down where there is a Federal immunity statute and an attempt is made to refuse to answer under a claim of privilege against self-incrimination under the state law. Thus in *Brown* v. *Walker*, 161 U. S. 591 (1895), a witness had refused to testify before the Interstate Commerce Commission on the grounds of the constitutional privilege against self-incrimination. There was a Federal immunity statute protecting against the use of such testimony in the Federal courts. The witness claimed that he might be subject to prosecution in the state courts. Upon his refusal to answer, he was adjudged to be in contempt and was taken into custody. This court affirmed the judgment of the court below. It held that

> "the danger to be apprehended must be real and appreciable • • • not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." (pp. 599-600)

The court regarded the Federal prosecution as "a merely remote and naked possibility."

It is the use in the Federal court below upon the trial of petitioner, over his objection, exception and claim of violation of his constitutional rights, of his testimony in the supplementary proceedings in the courts of the State of New York under penalty of fine and/or imprisonment, given at a time when, under prevailing decisions of this court, he had no choice, that is assigned here as error.

There is almost a complete absence of specific authority in the entire country on the exact point herein raised, to wit, the admissibility in one jurisdiction of testimony theretofore compelled in another jurisdiction under an immunity statute of that other jurisdiction.

Now, the issue has been fairly and squarely raised. That danger which the court in *Jack* v. *Kansas* (*supra*) believed was "too remote" and which the court in *Brown* v. *Walker* (*supra*) regarded as a "remote and naked possibility of imaginary and unsubstantial character", has come to pass. That type of evidence which this court could not believe would ever be availed of by the Government since it was under compulsion was used by the prosecution in the case at bar to effect the conviction of this petitioner. Its most prejudicial parts were emphasized on summation by the United States Attorney.

There is only one case in the entire country, a decision of the highest court of the State of Florida, *Clark* v. *State*, 68 Fla. 433, 67 So. 135 (1914), which has passed upon this important constitutional question, and that decision supports the petitioner's contention herein.

In the *Clark* case, *supra*, the defendant was indicted in the state court for the crime of embezzlement. Section 12 of the Constitution of the State of Florida is the counterpart of the Fifth Amendment of the Constitution of the United States relating to self-incrimination. Clark,

a bankrupt, had testified at the first meeting of creditors in the Federal court pursuant to the Bankruptcy Act. Under another section of that Act he was given immunity by reason of such testimony. The state prosecutor in the subsequent embezzlement trial introduced into the evidence notes taken by a court reporter at the bankruptcy hearing setting forth the testimony of Clark. On appeal, this was assigned as error. The Supreme Court of Florida held that the admission of that testimony, standing alone, was reversible error. It stated at page 436:

> "To permit the introduction of such proffered testimony would be violative of the provisions of Section 12 of the Declaration of Rights in our State Constitution in compelling, indirectly at least, the defendant in a criminal case to be a witness against himself."

In connection with the *Clark* case it is to be noted that the court there, just as the petitioner does here, specifically disclaimed any reliance upon a possible doctrine that the immunity statute of one forum can give immunity from prosecution in another forum. The decision was based wholly upon the constitutional protection of the state Bill of Rights, which is the exact equivalent of our Fifth Amendment.

The majority below was unable to find any decision directly supporting its ruling that the testimony was admissible. However, they apparently relied on a series of cases in this court where it has been held that a person may not raise a privilege against self-incrimination in one jurisdiction upon the ground that his answers may tend to incriminate him under the laws of another and different jurisdiction.* Obviously that is not the case at

* The majority cites the following cases: *U. S.* v. *Murdock*, 284 U. S. 141; and *Hale* v. *Henkel*, 201 U. S. 43, at page 69.

bar. Here the problem is the admissibility in that other jurisdiction of the very testimony which defendant had theretofore been compelled to give in the first jurisdiction. That problem has been raised only by *Clark* v. *State, supra,* and decided in petitioner's favor.

The majority of the Circuit Court below argued that even if there were a violation of the Fifth Amendment,

> "the record here fails to show wherein the appellant suffered prejudice." (p. 1672)

It is impossible to reconcile such an attempted justification for the affirmance of the judgment of the District Court with other portions of the opinion of the majority wherein they stated that

> "if the objection were well taken the judgment must be reversed" (p. 1669)

and wherein they further argued that

> "indeed, the appellant's fraudulent intent was proved out of his own mouth by the introduction of testimony given by him in supplementary proceedings conducted by judgment creditors in courts of the State of New York." (p. 1668)

A mere cursory reading of the damaging and highly inflammatory testimony given by the petitioner under compulsion in the state courts will clearly spotlight the prejudice that the majority below presumably was unable to find.

Apparently unconvinced of the soundness of their general ruling on this point, the majority below isolated one out of the six examinations in supplementary proceedings, that one taken in July, 1937 (p. 1672), attempted to justify its particular admission into evidence, and then brushed aside the remaining and additional supplementary

proceedings at later dates (Government Exhibits 95, 95A, 95B, 100, 101; pp. 1597-1607, 1613-1619) upon the ground that they could have had no substantial effect upon the jury's verdict.

A reading of these other supplementary proceedings will clearly establish that any one of them, and certainly all of them together, must have had a tremendous effect upon the jury (pp. 1597-1607; 1613-1619). However, even the argument for the admissibility of the testimony in the July, 1937, supplementary proceeding falls of its own weight upon even the slightest analysis. The majority states that petitioner could not have had a privilege in July, 1937, against testifying as to a crime he did not commit until August (p. 1672). A reading of the indictment (pp. 2-14) shows that the scheme to defraud in question was alleged to commence on July 1, 1936, and to continue up to and including the date of the filing of the indictment, to wit, August, 1940. At the time the petitioner testified in supplementary proceedings in the state courts in July of 1937 he was, according to the indictment and the proof elicited at the trial below, right in the midst of the crime in question. In fact, the evidence of his testimony of July, 1937, was admitted for the very purpose of proving an essential element of the actual crime charged (pp. 1463-4).

Again reliance is placed on the fact that the Government had delayed the indictment until August, 1940, and had thereby allegedly given petitioner immunity against prosecution for offenses committed prior to August, 1937, and therefore had rendered admissible the testimony in question. The fact is that the indictment charged, and the jury found, that the defendant, from January 1, 1936, up and through August of 1940, devised a scheme to defraud and mailed certain letters in furtherance

thereof. It is difficult to understand what sort of immunity was given by the Government's failure to indict sooner. But there can be no gainsaying that essential, vital and highly prejudicial evidence tending to prove an essential element of the Government's case was established by means of that compulsory testimony theretofore given in the state courts. Consequently there was a clear deprivation of the defendant's constitutional right against self-incrimination. Judge Clark, in the dissenting opinion below, states unequivocally:

> "In plain fact he was required to incriminate himself. And the justification thought to be obtained by delaying prosecution until the statute of limitations had run as to matter covered by a part of his examination seems to me beneath the dignity of a great government, indeed, not the maintaining of those 'civilized standards of procedure and evidence' required by *McNabb* v. *United States,* 63 S. Ct. 608, 613." (p. 1677)

While the specific objectionable testimony in the case at bar was obtained in New York State through supplementary proceedings, the problem is one which far transcends this one defendant and this type of compulsory testimony. The question might well have arisen and undoubtedly will arise in the future as to the admissibility in one jurisdiction of testimony obtained in another jurisdiction through Grand Jury proceedings or through any one of the myriad of proceedings whereby testimony can be taken compulsorily under an immunity statute. In essence, it goes to the very foundation of our judicial precepts that a defendant should not be convicted upon the basis of compulsory self-disclosure. The rationale of this basic doctrine is well stated by the leading authority on evidence in this country:

> "Any system of administration which permits the prosecution to trust habitually to compulsory self disclosure as a source of proof must itself suffer *morally* thereby." *Wigmore on Evidence* (2nd Ed. 1923), Section 2261.

Casting aside the novel and ingenious attempt on the part of the majority below to avoid the natural result of reversible error caused by a clear violation of the constitutional provision against self-incrimination, the plain fact is that testimony was admitted in the Federal Court which had theretofore been taken in the State Court compulsorily under a state immunity statute, and the petitioner's conviction in the Federal Court was effectuated by means of that compulsory self-disclosure.

II

The Circuit Court erred in sustaining the District Court's deprivation of petitioner's basic right of cross-examination of the witnesses Miller and Goetz, the two partners of Stout & Co., on vital parts of the Government's case.

It would serve no purpose to argue this point at length, for even the majority opinion of the Circuit Court itself concedes that the curtailment of petitioner's right of cross-examination was error (pp. 1674-5). (*Wigmore on Evidence*, 2nd ed., Sections 1041-1042; *Judson* v. *Fielding*, 227 App. Div. 439, aff'd 253 N. Y. 596; *Pierce* v. *Sanden*, 29 Fed. 2d, 87, 90 (C.C.A. 8th Cir.); *Barrett* v. *N. Y. C. & H. R. R. R. Co.*, 157 N. Y. 663, 670; *Lilly* v. *Hamilton Bank*, 178 Fed. 53, 59 (C.C.A. 3rd Cir.)), all cited in the majority opinion, as well as *Chicago, Milwaukee &*

St. Paul Railway v. *Artery*, 137 U. S. 507, at page 519 (1890), and *Wolfe* v. *Madison Avenue Coach Co., Inc.*, 171 Misc. 707, at page 710 (N. Y. App. Term 1st Dept., July, 1939).

The dissenting judge below, in discussing the effect of the erroneous ruling of the trial court, declared:

> "In view of the importance of this evidence on the most vital issue of the case, I think this ruling alone would require reversal." (p. 1676)

The majority, on the other hand, after pointing out in some detail the justification for the position of petitioner, attempted to dismiss the vital effect of the error by stating that in their opinion it could not have affected the jury's verdict.

Petitioner has set forth succinctly in that portion of his petition devoted to this particular matter sufficient facts to show clearly the falsity of any such conclusion.

Any pretense that a defendant must be afforded a fair trial becomes a sham and a delusion if the conviction below is allowed to stand despite the fact that petitioner was completely deprived of any opportunity to attack in a most vulnerable spot the veracity of the two chief Government witnesses on a vital portion of the prosecutor's case.

III

The Circuit Court erred in holding that the transactions in 1930 with Emanuel & Co. were admissible in evidence.

The gist of the Government's charge in the indictment and the proof was that Sam Feldman was "kiting" checks. The record of the trial is largely made up of

proof of the cashing of checks almost daily from July, 1936, to April, 1938, the funds from subsequent checks being used to cover the clearance of checks previously issued. This was made possible by the fact that it took four days or more for the checks drawn on the Michigan bank to clear. There was no "kiting" of any kind involved in the transaction with Emanuel & Co. The situation was simply one where petitioner, in 1930, operated a margin account with a stock brokerage firm and, during its course, deposited a draft as margin which was subsequently dishonored. That was at least six years before the occurrence set forth in the indictment in this case. The transaction in question was not probative of any fraudulent intent as to the offenses charged in the indictment, in essence a scheme to defraud by means of "kiting" checks.

As a general rule, in a criminal case, evidence which tends to show that the defendant has committed another independent offense may not be introduced to prove the commission of the crime charged (*Boyd* v. *U. S.*, 142 U. S. 450 (1891)). There are, it is true, exceptions to this general rule. But these exceptions are circumscribed by certain recognized specific requirements. Thus where intent is in issue, evidence of another offense may be admissible to prove intent provided it is (1) so connected in time *and* (2) so similar in other respects that the commission of the similar acts is clearly probative of the defendant's intent on the main charge.

It is the rule in all jurisdictions that the similar acts must occur at or near the time of the offense charged in the indictment and not to be too remote.

Wolf v. *U. S.*, 290 Fed. 738 (C.C.A. 2nd 1923);
Simpkins v. *U. S.*, 78 Fed. (2nd) 594 (C.C.A. 4th 1935);

Jianole v. *U. S.*, 299 Fed. 496 (C.C.A. 8th 1924);
Harris v. *U. S.*, 273 Fed. 785, 791 (C.C.A. 2nd 1921), certiorari denied, 257 U. S. 646 (1921);
Cf. *Packer* v. *U. S.*, 106 Fed. 906 (C.C.A. 2nd 1901);
Kercheval v. *U. S.*, 12 Fed. (2nd) 904 (C.C.A. 8th 1926), rev. 274 U. S. 220 (1926) on other grounds.

In *Wolf* v. *U. S., supra,* the Circuit Court of Appeals for the Second Circuit held that an offense which occurred almost two years after the crime charged in the indictment was too remote to be admissible. The court italicized and emphasized the fact that the evidence admitted concerned an offense which occurred *almost two years* after the period of the indictment.

In *Simpkins* v. *U. S., supra,* evidence of sales or evidence of other offenses starting *three years* before the indictment was held to be inadmissible.

In *Jianole* v. *U. S., supra,* it was held that an offense committed *a year and a half* before the period in the indictment was too remote in point of time to be admissible.

In *Packer* v. *U. S., supra,* the Second Circuit was in some doubt as to whether an offense occurring *only one year* before the charge in the indictment was admissible.

In the case at bar there was an interval of some *six to seven years* between the Emanuel transaction and the acts charged in the indictment.

During the course of the discussion in the *Packer* case, the court said at page 909:

> "The most serious criticism made upon the ruling admitting evidence in regard to the previous business transactions of the accused is because of the remoteness of time at which those transactions

took place. Evidence of offenses not connected with the one for which the accused is on trial is generally inadmissible. Ordinarily it does not tend to prove him guilty of the particular offense and is exceedingly prejudicial in affecting his character with the jury."

Entirely apart from any question of remoteness in time, it is necessary that the other offense proven be so logically and plainly similar to the act charged in the indictment as to be logically and plainly probative of the defendant's present intent.

Boyd v. *U. S.*, 142 U. S. 450 (1891);
Erber v. *U. S.*, 234 Fed. 221 (C.C.A. 2nd 1916);
MacDonald v. *U. S.*, 264 Fed. 753 (C.C.A. 1st 1920);
Paris v. *U. S.*, 260 Fed. 529 (C.C.A. 8th 1919);
Niederluecke v. *U. S.*, 21 Fed. (2nd) 511 (C.C.A. 8th 1927).

The courts are aware that this type of evidence is very prejudicial and usually results in unfair surprise and embarrassment to the defendant.

In *Fish* v. *U. S.*, 215 Fed. 544 (C.C.A. 1st 1914) at page 549, the court said:

"Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case."

In *Niederluecke* v. *U. S.*, *supra*, the court in referring to evidence of this nature said at page 513:

"• • • From the nature and prejudicial character of such evidence, it is obvious that it should not be received, unless the mind plainly perceives

> that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner."

In *Shea* v. *U. S.*, 236 Fed. 97 (C.C.A. 6th 1916), the conviction of defendant was reversed as a result of the admission in evidence of an alleged similar offense. In that case a so-called "Kehoe" incident consisting of evidence of an alleged fraudulent mining stock scheme was admitted into evidence over objection and exception. Although this incident occurred practically at the same time as the crime charged in the indictment, its admission was held to be reversible error because it showed at most merely a general "disposition" to fraud (see p. 104). The Emanuel transaction herein at most showed no more than that. The "sameness" necessary to be probative of intent is entirely missing.

The majority cites its own case of *U. S.* v. *Seeman*, 115 Fed. 2nd 371 (C.C.A. 2nd 1940) as authority for the proposition that the transaction in the Emanuel case was sufficiently similar in character to be admissible on the issue of intent. The essence of that decision, sustaining the proposition that identity of all factors is not required to render similar offenses admissible, is that where the crime charged is one involving interstate movement of stolen bonds a similar offense would involve a stolen bond situation purely local in character. Its analogy lies in the rule that in a mail fraud case a similar offense might be admissible even though the mails had not been used.

See also:

Quig v. *U. S.*, 33 Fed. (2d) 820 (C.C.A. 3rd 1929).

The admission of the Emanuel transaction was exceedingly prejudicial to the petitioner. The length of time

devoted to its proof (pp. 985-1011; 1033-1130), the large sum of money involved, the emphasis placed upon it by the Government, the fact that it came near the end of the Government's case, the allusion to it in the summation by the Government (p. 1468) as well as in the judge's charge, all these gave it great importance and stature. It was offered on the Government's direct case. *The petitioner did not take the stand, nor did he present any character evidence. Nevertheless, this alleged, fraudulent isolated transaction occurring six to seven years prior to the beginning of the indictment period, ten years before the filing of the indictment and twelve years prior to the trial, was admitted and allowed to be considered by the jury in determining the guilt or innocence of this petitioner.*

Its admission, standing alone, should result in a reversal of this conviction.

IV

The submission to the jury of the Government's bill of particulars with the names of 115 alleged victims constituted reversible error.

The court by its ruling on the bill of particulars and by its charge in connection therewith in effect gave the jury untrammeled discretion to convict the petitioner if it found a scheme to defraud any one of the 115 persons. As shown in the petition, by the prosecutor's own admission there was no evidence as to 112 of these alleged victims.

For aught we can tell, the conviction was based upon a finding that there was a scheme to defraud one of the 112 alleged victims as to whom admittedly there is a complete failure of evidence. Certainly petitioner should not

be deprived of his liberty for five years by any such procedure wherein it cannot be clearly determined just what he had been convicted of. Under our trial procedure the very least that should have occurred was that only those matters upon which a conviction could stand be submitted to the jury. In a very recent decision of the State of New York that exact type of situation occurred and resulted in a reversal.

In *People* v. *Levine*, 265 App. Div. 513 (1943) defendant had been convicted of the crime of perjury in the first degree under an indictment alleging seven different instances of false swearing, as to four of which no supporting evidence had been adduced. A request to allow consideration by the jury of only those specific charges concerning which evidence was adduced was made and refused.* This was held to be error, the court writing as follows:

> "Though defendant makes no complaint concerning that portion of the court's charge which permitted the jury to find defendant guilty of perjury if any one of the seven assignments stated in the indictment was supported by the evidence, he urges that the submission of the 4th, 5th, 6th and 7th assignments was error. As to these four specifications, the evidence did not support the charge of false swearing. Where the attention of the court on the trial was specifically called to the question and the court upon objection by the defendant refused to withdraw from the consideration of the jury the assignments which had not been sustained by the proof, this court cannot disregard the error. Particularly is this true since at the trial the prosecutor in effect conceded that these

* Note that in the case at bar a request to limit the bill to the three purported victims—Essex House, Stout & Co. and Edward S. Reynolds—was made and refused.

> specifications should not be submitted to the jury. (*Wood* v. *People*, 59 N. Y. 117, 122; *People* v. *Root*, 94 App. Div. 84, 91)."

At the very least, by submitting these 115 names (supposedly those described by the Grand Jury in its indictment as "too numerous to mention specifically") the court erroneously created a most prejudicial situation to petitioner wherein the jury was led to believe that petitioner had indulged in wholesale wrongdoing. This must result in a reversal because of its effect on the jury's mind. Identical in principle is the case of *Booth* v. *U. S.*, 139 Fed. 252 (C.C.A. 2nd Cir. 1905) wherein the court, reversing the conviction in that case, wrote, at page 256:

> "The error must have been prejudicial to the defendant. It must have helped to induce a belief in the jury's mind that the defendant had carried on the same scheme in scores of instances to the extent of thousands of dollars."

V

The erroneous charge of the trial court to the jury respecting the crime with which petitioner was charged and its refusal to grant petitioner's request for a specific charge correcting its error constituted reversible error.

The trial court, throughout its charge, instructed the jury that it could bring in a verdict of conviction if it found that petitioner had devised a scheme to obtain money under false pretenses. Petitioner had not been indicted for that crime. This error was specifically called to the court's attention by defense counsel. After a

further charge by the trial judge which still left the matter in doubt (p. 1507), petitioner's counsel requested a specific charge to the jury as follows:

> "I ask your Honor to charge the jury that they cannot find this defendant guilty of a scheme to obtain money under false pretenses, that that crime is not charged in the indictment." (p. 1507)

The court refused to instruct the jury in accordance with such request.

The refusal of the court to restrict the consideration of the jury to the single crime of a scheme to defraud was reversible error. In *Beck* v. *U. S.*, 145 Fed. 625, 626 (C.C.A. 2d, 1906), at page 626, the court wrote:

> "The effect of the instruction was to authorize the jury to convict the defendant of an offense for which he was not upon trial. * * * The defendant was on trial for one offense, and he may have been convicted of another."

In *Hass* v. *U. S.*, 93 Fed. 2nd 427 (C.C.A. 8th) the court, by Sanborn, C. J., at pages 434, 435, wrote as follows:

> "Thus, while charging a scheme to obtain, by means of certain false pretenses, a secret profit from the Foresters and its members as they should exist after merger, the government succeeded in proving a scheme whereby the defendants other than Parks were to obtain, by concealment of facts which they were obligated to disclose, a secret profit from Parks upon completion of the merger.
>
> "Whether the breach of trust of which the defendants who were officers of the Modern Brotherhood were clearly guilty in concealing what it was their duty to disclose, thereby obtaining for them-

> selves money from Parks which the law would not permit them to convert to their own use, would be a scheme or artifice to defraud under section 215, Criminal Code, * * * it is not necessary to determine, since the scheme which was proved was not, in any event, the scheme which the government alleged in the indictment."

Under the court's charge in the case at bar, the petitioner may well have been convicted of devising a scheme to obtain money by false pretenses and promises, a crime for which he was never indicted. Once again, just as in the bill of particulars point (see Point IV, *supra*), one is forced to speculate as to just what petitioner was convicted of. Indeed, under these circumstances it is hardly surprising that the dissenting judge concluded his opinion by stating:

> "* * * I must express my fear that defendant was tried and convicted of general amoral conduct rather than of specific intent to defraud by mail." (p. 1677)

VI

The errors of the trial court deprived petitioner of a fair trial and the Circuit Court of Appeals erred in failing to reverse petitioner's conviction.

In addition to the specific errors of the trial court, disregarded or approved by the Circuit Court's majority opinion and more fully hereinabove discussed, there were additional errors of a serious nature.

1. For example, the prosecutor commented in his summation upon the failure of petitioner to produce as a witness the Florida attorney for one of prosecution's wit-

nesses, who had been mentioned in the testimony of the said witness (p. 661), to rebut a self-serving statement made by the latter. Not a word in the record indicates that petitioner was ever aware of the possibility of this attorney becoming an issue or that petitioner knew that such attorney existed before the testimony in question was given. Despite prompt request by counsel, the court refused to strike out the remarks of the prosecutor (p. 1469).

It is well established that comment by the prosecutor upon the failure of a defendant to call a witness, particularly under such circumstances, is reversible error (*Graves* v. *U. S.*, 150 U. S. 118 (1893); *Hamburg-American Steam Packet Co.* v. *U. S.*, 250 Fed. 747 (C.C.A. 2nd, 1928); *Rostello* v. *U. S.*, 36 Fed. 2nd 899 (C.C.A. 7th, 1927)).

The burden of proof is on the Government in a criminal case and the guilt of the defendant must be proven beyond a reasonable doubt. The defendant may choose to remain mute and he need not present any evidence at all to the jury; he may rest upon the Government's case.

No inference is allowable where the witness in question is available to both parties and is not in close relationship with the party who, it is claimed, should have called him.

> *Wigmore on Evidence*, 2nd Edition, Sec. 288;
> *Longacre* v. *Yonkers Railway*, 236 N. Y. 126 (1923).

The proposed witness was unknown to the petitioner, clearly not in any close relationship to him and was in fact more available to the Government, inasmuch as he was the attorney for the Government witness, Betty King (p. 661).

Furthermore, any untoward inference is clearly improper and unjustified where the testimony of the witness

will be comparatively unimportant and might well be dispensed with by a party on the general grounds of inconvenience (*Wigmore, supra,* Sec. 287). Production of this alleged witness would have required his being brought from Florida probably by plane, at great expense to the petitioner.

Furthermore, the testimony of this witness would have been inadmissible. A denial on his part of any conversation with Betty King would have been impeachment on a collateral matter and therefore inadmissible. Besides, any discussion between Miss King and this attorney would have been privileged communications.

In *Graves* v. *United States, supra,* the Supreme Court reversed a conviction where comment was made on the failure to produce a witness who would have been incompetent to testify.

The fact that the witness in question might have given relatively unimportant testimony makes the error graver. As the court said in the *Graves* case, *supra, the less value the testimony of the particular witness would have, the more prejudicial becomes the comment of the district attorney in calling the jury's attention to the failure to call that particular witness.* By his remark, the prosecutor undoubtedly created an impression in the minds of the jury that the petitioner was withholding testimony which would be unfavorable to him, and thereby he was raising an inference which under the law could not be raised. The *Graves* case said that it was the duty of the court, upon objection, to act upon the prejudicial remarks. In the case at bar the court specifically refused to strike them out when requested by the defense counsel (p. 1469).

This unwarranted and inexcusable statement and conduct on the part of the prosecutor, bolstered as it was

by the court's refusal to strike it from the record, constitutes serious prejudicial error, requiring a reversal of the judgment of conviction.

2. Then again, the court committed additional prejudicial error when it refused the petitioner's request to charge that, to constitute a scheme to defraud, the one whom it is sought to defraud must be ignorant of the facts constituting the scheme (pp. 1493-4).

Norton v. *United States*, 92 Fed. (2nd) 753 (C.C.A. 9th, 1937);
Milby v. *United States*, 109 Fed. 638 (C.C.A. 6th, 1901).

Petitioner's defense was to the effect that the alleged victims were not defrauded but to the contrary knew all the facts. The refusal of the trial judge to charge as requested was patent error prejudicial to petitioner.

3. Similarly, the court refused to charge that the party allegedly defrauded must not knowingly have taken part in the so-called scheme himself (pp. 1493-5).

4. In addition to the foregoing, the court treated defense and prosecution counsel differently; as stated by Judge Clark, "the former being required to state his proposed testimony at length in chambers, to be there ruled out for the most part, while the latter was allowed to present his claims as usual in the court room before the jury" (p. 1677).

Summary

Analyzing the case in its entirety, petitioner respectfully submits that he was not accorded a fair trial confined to the issues on which he was indicted. In seriatim:

(1) Vital portions of the Government's case were proven through testimony elicited under compulsion in the state courts.

(2) Petitioner was completely deprived of a vital right of cross-examination.

(3) A dissimilar and alleged illegal act occurring twelve years before the trial and absolutely unrelated to the crime charged in the indictment was submitted for the jury's consideration.

(4) An atmosphere of wholesale wrongdoing on the part of petitioner was created by the submission to the jury of the names of 115 alleged victims.

(5) The court charged the jury that petitioner could be convicted of a crime not alleged in the indictment and thereafter refused clearly to correct that error.

(6) Unwarranted, unfair and prejudicial comments by the prosecutor were permitted to be made and to stand despite objection.

(7) The court refused to charge the jury on matters which were clearly in accordance with the law and formed the basis of the defense, to wit, the complete knowledge of the alleged victims and the lack of concealment on the part of petitioner.

(8) Prejudice was necessarily created by, in the words of Judge Clark, dissenting, "different treatment of defense and prosecution counsel" (p. 1677).

The trial court completely failed to exercise its historic judicial function—to protect the accused by according him a fair trial on the charge of which he stood accused.

CONCLUSION

It is respectfully submitted that for all of the foregoing reasons, and particularly because of the important Federal constitutional questions involved and herein presented, the petition for certiorari should be allowed.

Respectfully submitted,

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APPENDIX

Section 338, Title 18, U. S. Code

338. (Criminal Code, Section 215.) Using Mails to Promote Frauds; Counterfeit Money. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both. (R. S. §5480; Mar. 2, 1889, c. 393, §1, 25 Stat. 873; Mar. 4, 1909, c. 321, §215, 35 Stat. 1130.)

N. Y. Civil Practice Act Sec. 789:

Privilege of a debtor, party or witness upon examination.

A debtor, party or witness examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud; * * * But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding, except on a charge or indictment for perjury committed in such examination. (Added by L. 1935, ch. 630, in effect Sept. 1, from former §791.)

As amended by L. 1938 ch. 108, in effect March 14, the above section reads as follows:

A debtor, party or witness examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud * * * but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding, except on a charge or indictment for perjury committed in an examination under this article.